

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TARCICIO MORA, an individual, and	)	Case No. 11-6598 SC
REMEDIOS MORA, an individual,	)	
	)	ORDER DENYING PLAINTIFFS'
Plaintiffs,	)	MOTION TO REMAND AND
	)	DENYING DEFENDANTS' MOTION
v.	)	<u>TO DISMISS</u>
	)	
U.S. BANK N.A., as Trustee for the	)	
holders of the First Franklin	)	
Mortgage Loan Trust Mortgage Pass-	)	
Through Certificates, Series 2005-	)	
FF9, SELECT PORTFOLIO SERVICING,	)	
INC., and NATIONAL DEFAULT	)	
SERVICING CORPORATION,	)	
	)	
Defendants.	)	

---

**I. INTRODUCTION**

On December 21, 2011, this action was removed to this Court from a California state court. Now this Court must decide a motion to remand brought by Plaintiffs Tarcicio and Remedios Mora (collectively, "Plaintiffs"). Also before the Court is a motion to dismiss the original state court complaint, brought by Defendants U.S. Bank N.A., Select Portfolio Servicing, Inc., and National Default Servicing Corporation (collectively, "Defendants"). Lastly, Defendants have objected to Plaintiffs' filing of both a First Amended Complaint and a "corrected" First Amended Complaint. Pursuant to Civil Local Rule 7-1(b), the Court determines that these matters are suitable for decision without oral argument. For

1 the reasons set forth below, the Court DENIES Plaintiffs' motion to  
2 remand, OVERRULES Defendants' objection to Plaintiffs' amended  
3 pleadings, and DENIES AS MOOT Defendants' motion to dismiss the  
4 original complaint.

## 5 6 **II. BACKGROUND**

7 On October 28, 2011, Plaintiff Tarcicio Mora filed a Complaint  
8 against Defendants in the Superior Court of the State of California  
9 in and for the County of Sonoma. ECF No. 1 ("Not. of Removal") Ex.  
10 A ("Compl.").<sup>1</sup> The Complaint alleges five causes of action, all  
11 arising under California state law: (1) violation of California  
12 Civil Code § 2923.5, (2) violation of California Civil Code §  
13 17200, (3) breach of contract, (4) promissory estoppel, and (5) a  
14 cause of action styled "declaratory relief."

15 On December 21, 2011, all three Defendants timely removed this  
16 action to the United States District Court for the Northern  
17 District of California, availing themselves of this Court's removal  
18 jurisdiction over diversity cases. Not. of Removal at 2. A week  
19 later, on December 28, 2011, Defendants filed a Motion to Dismiss  
20 the Complaint. ECF No. 5 ("Mot. to Dismiss"). Mora had until  
21 January 11, 2012 to file a responsive brief; he did not do so.  
22 Additionally, because this case was initially assigned to a  
23 magistrate judge, Civil Local Rule 73-1(a)(1) obligated Mora either  
24 to consent to the magistrate judge's jurisdiction or affirmatively  
25 request reassignment to a district judge. The Clerk of the Court  
26 sent the appropriate forms to Mora's counsel. ECF No. 8. Mora did

---

27  
28 <sup>1</sup> Plaintiff Remedios Mora had not yet joined the case. This  
Section's references to "Mora" refer to Tarcicio Mora individually.

1 not respond. Accordingly, on January 13, 2012, this case was  
2 reassigned to the judge now presiding. ECF No. 11. On January 18,  
3 2012, Defendants renoticed their Motion to Dismiss, placing it  
4 before the judge now presiding. ECF No. 12. On the same day, they  
5 filed a brief noting that Mora had not opposed the Motion to  
6 Dismiss and asking the Court to consider an additional reason for  
7 dismissal: failure to prosecute. ECF No. 13 at 2-3.

8 On January 23, 2012, Tarcicio Mora, now joined by Remedios  
9 Mora, filed their First Amended Complaint, ECF No. 15 ("FAC"),  
10 along with a Motion to Remand this action back to California  
11 Superior Court, ECF No. 16 ("Mot. to Remand"). The following day,  
12 on January 24, 2012, Plaintiffs filed a Corrected First Amended  
13 Complaint. ECF No. 17 ("CFAC"). Later that day, Defendants  
14 objected to both the FAC and the CFAC as untimely and asked the  
15 Court to strike them. ECF No. 18 ("Obj.") at 2-3. In the  
16 alternative, Defendants requested leave to file another motion if  
17 the Court permitted the amended pleadings to stand. Id. at 3.

### 18 19 **III. DISCUSSION**

#### 20 **A. Defendants' Removal Was Proper**

21 If a federal court would have had subject-matter jurisdiction  
22 over a civil action which a plaintiff chooses to file in state  
23 court instead, a defendant may remove the case to federal court.  
24 28 U.S.C. § 1441(a). A case is removable pursuant to federal  
25 diversity jurisdiction when there is complete diversity between the  
26 parties and the amount in controversy exceeds \$75,000. Id. §  
27 1441(b) (citing id. § 1332(a)). Removal occurs at the defendant's  
28 behest; the proper procedure for challenging removal is for a

1 plaintiff to file a motion to remand the case back to state court.  
2 See 28 U.S.C. § 1447(c); Moore-Thomas v. Alaska Airlines, Inc., 553  
3 F.3d 1241, 1244 (9th Cir. 2009). In the instant case, Plaintiffs  
4 challenge removal on jurisdictional grounds. They maintain that  
5 Defendants, who removed in diversity, have failed to show that more  
6 than \$75,000 is in controversy.

7 Plaintiffs' argument rests on the faulty premise that the  
8 Court may use the FAC, rather than the original Complaint, to  
9 decide this Motion. See Mot. to Remand at 3, 5. The original  
10 Complaint requests monetary relief but does not supply a dollar  
11 figure. Compl. at 17. As explained below, this results in the  
12 Court using the value of the Plaintiffs' home (the "Subject  
13 Property") to calculate the amount in controversy. Plaintiffs'  
14 amended complaint, however, prays for monetary relief in the  
15 jurisdictionally insufficient amount of \$65,000.<sup>2</sup> Id. at 5.  
16 Plaintiffs invite the Court to find that only that amount is in  
17 controversy here. The Court declines to do so. It is beyond  
18 dispute that a court deciding a motion to remand may base its  
19 decision only on the complaint that was operative at the time of  
20 removal. See Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers,  
21 Inc., 159 F.3d 1209, 1213 (9th Cir. 1998). And "a plaintiff may  
22 not compel remand by amending a complaint to eliminate" the basis  
23 of the Court's removal jurisdiction. Id.

24 The operative pleading at the time of removal was Plaintiffs'

---

25 <sup>2</sup> Plaintiffs nowhere attempt to justify why they are entitled to  
26 damages in the precise amount of \$65,000, as opposed to a figure  
27 that would clearly support removal. Plaintiffs' omission supports  
28 an inference that the \$65,000 figure was contrived to defeat  
removal. The Court reminds Plaintiffs' counsel of Rule 11(b)'s  
prohibition on presenting a pleading to the Court for any improper  
purpose.

1 original state court Complaint. Because the Complaint requests  
2 monetary relief but contains no dollar amounts, Defendants bear the  
3 burden of showing by a preponderance of the evidence that more than  
4 \$75,000 is in controversy here. See Singer v. State Farm Mut.  
5 Auto. Ins. Co., 116 F.3d 373, 377 (9th Cir. 1997). To this end,  
6 Defendants draw the Court's attention to the Complaint's fifth  
7 cause of action. Titled "Declaratory Relief," this cause of action  
8 contends that "Defendants' security interest in the Subject  
9 Property has been rendered void . . . ." ECF No. 20 ("Defs.' Opp'n  
10 to MTR") at 5 (quoting Compl. ¶ 81).

11 When a plaintiff seeks declaratory relief, "it is well  
12 established that the amount in controversy is measured by the value  
13 of the object of the litigation." Chapman v. Deutsche Bank Nat.  
14 Trust Co., 651 F.3d 1039, 1045 n.2 (9th Cir. 2011) (quotation marks  
15 omitted). In actions to enjoin foreclosure sales, to quiet title,  
16 or to remove a cloud from title, the object of the litigation is  
17 the real estate itself. See id. Thus, the object of litigation in  
18 this case is clearly the Subject Property, since Plaintiffs seek  
19 postponement of the foreclosure sale and a declaration that  
20 Defendants' interest in the Subject Property is void, which would  
21 extinguish Defendants' power to seek foreclosure.

22 The only question left, then, is whether a preponderance of  
23 the evidence shows that the Subject Property is worth more than  
24 \$75,000. The Court finds that it does. The Court takes judicial  
25 notice of the Deed of Trust for the Subject Property. ECF No. 6  
26 Ex. 1 ("DOT"). This document, as Defendants point out, indicates  
27 that the Subject Property acts as security for a loan in the  
28 original principal amount of \$400,000. Defs.' Opp'n to MTR at 5

(citing DOT at 1). Plaintiffs have presented no opposing evidence. Although it is possible that a \$400,000 loan might be secured by a property worth less than \$75,000 -- secured, that is, by pennies on the dollar -- such an arrangement is highly unlikely. Moreover, the Subject Property is a family home in Petaluma, California, and the Court takes judicial notice of the fact, generally known in this District, that few if any residential properties there sell for less than \$75,000. Fed. R. Evid. 201(b). Accordingly, the Court finds that it is more likely than not that the Subject Property was worth in excess of \$75,000 at the time of removal.<sup>3</sup> Because the Court determines that the amount in controversy here exceeds the jurisdictional amount, the Court DENIES Plaintiffs' Motion to Remand.

**B. The FAC Was Timely Filed**

Because the Court retains jurisdiction over this matter, it must decide Defendants' pending Motion to Dismiss. But first, the Court must rule on Defendants' Objection to Plaintiffs' filing of the FAC and CFAC. Defendants challenge the FAC as untimely. See Obj. at 2-3. The Court does not agree. Federal Rule of Civil Procedure 15 provides:

A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is

---

<sup>3</sup> The Court need not reach Defendants' arguments seeking to bring other amounts into controversy (e.g., attorney fees). However, the Court pauses to note that Defendants summarily state that attorney fees and costs "count[] toward the jurisdictional amount" for diversity. Defs.' Opp'n to MTR at 5. That is a misstatement of the law. See Dukes v. Twin City Fire Ins. Co., No. CV-09-2197-PHX-NVW, 2010 WL 94109, at \*2 (D. Ariz. Jan. 6, 2010) (observing that there is "disagreement within [the Ninth Circuit's District Courts] as to whether attorneys' fees incurred after the date of removal are properly included in the amount in controversy").

1 required, 21 days after service of a responsive pleading  
2 or 21 days after service of a motion under Rule 12(b) . .  
3 . , whichever is earlier.

4 Here, Plaintiff's Complaint is one "to which a responsive pleading  
5 is required" -- namely, an Answer. Defendants, as is their right,  
6 filed the instant Rule 12(b) Motion to Dismiss instead. Defendants  
7 represent that they served this Motion on Plaintiffs on December  
8 28, 2011. Obj. at 2-3. Therefore, under Rule 15, Plaintiffs had  
9 until January 18, 2012, to amend the Complaint.

10 Rule 6(d) gives a party three extra days to respond if the  
11 party is served in certain ways, for example, by mail or electronic  
12 means. Plaintiffs represent that they were served with the Motion  
13 in one of those ways. See Pls.' Resp. to Obj. 2. Thus, Rule 6(d)  
14 extended Plaintiffs' January 18 deadline by three days, to January  
15 21, 2012. That day was a Saturday. Rule 6(a)(1)(C) extends any  
16 due date that falls on a Saturday "until the end of the next day  
17 that is not a Saturday, Sunday, or legal holiday." In this case,  
18 the rule extended Plaintiffs' time to amend its pleading to Monday,  
19 January 23, 2012, and it was on that date that Plaintiffs filed the  
20 FAC. Accordingly, the Court OVERRULES Defendants' Objection to the  
21 filing of the FAC.

22 The CFAC warrants separate examination. Plaintiffs,  
23 unhelpfully, failed to file a Notice of Errata along with the CFAC,  
24 so it is not apparent to the Court what in the FAC they corrected,  
25 why correction was needed, or, significantly, why the purported  
26 correction is not an amendment unto itself within the meaning of  
27 Rule 15. See Thomas v. Hickman, No. 1:06-cv-00215-AWI-SMS, 2007 WL  
28 4302974, at \*1 (E.D. Cal. Dec. 06, 2007) (construing correction  
filed two days after FAC to be the operative pleading where

1 correction was filed along with Notice of Errata). Nevertheless,  
2 "[u]nless undue prejudice to the opposing party will result, a  
3 trial judge should ordinarily permit a party to amend its  
4 complaint." Howey v. U.S., 481 F.2d 1187, 1190 (9th Cir. 1973).  
5 Thus, even if the Court were to construe the CFAC as an amendment  
6 made under Rule 15(b) rather than a correction to an amendment made  
7 under Rule 15(a), it still would grant leave to amend in the  
8 absence of undue delay, bad faith, futility, or, most importantly,  
9 prejudice to Defendants. See Eminence Capital, LLC v. Aspeon,  
10 Inc., 316 F.3d 1048, 1051-52 (9th Cir. 2003) (citing Foman v.  
11 Davis, 371 U.S. 178, 182 (1962)). The Court discerns no prejudice  
12 to Defendants resulting from stylistic amendments made one day  
13 after an earlier filing.

14 Accordingly, the Court OVERRULES Defendants' objection to  
15 Plaintiffs' filing of the CFAC. The CFAC is the operative  
16 complaint in this case.

17 **C. Defendants' Motion to Dismiss Is Moot**

18 Having determined that the CFAC is the operative complaint,  
19 the Court observes that Defendants' pending Motion to Dismiss  
20 addresses only the original state court Complaint. Plaintiffs  
21 never filed a brief in opposition to that Motion, instead amending  
22 their pleading as a matter of right. The differences between the  
23 original state court Complaint and the CFAC, though slight, have  
24 enough substance that the Court cannot say at this juncture that  
25 the pleadings are materially identical. Cf. Williamson v.  
26 Sacramento Mortg., Inc., No. S-10-2600 KJM DAD, 2011 WL 4591098, at  
27 \*1-2 (E.D. Cal. Sept. 30, 2011) (applying motion to dismiss  
28 original complaint to claims in amended complaint that were



1 "substantially similar"). Moreover, Plaintiffs should have the  
2 chance to defend their pleading now that amendment as a matter of  
3 course is off the table.

4 The Court therefore DENIES the pending Motion to Dismiss as  
5 moot. The Court grants Defendants fourteen (14) days from the date  
6 of this Order to file a motion responding to the CFAC.

7  
8 **IV. CONCLUSION**

9 The Court DENIES Plaintiffs' Motion to Remand this action back  
10 to California state court and retains jurisdiction over the case.  
11 The Court OVERRULES Defendants' Objection to the filing of the  
12 First Amended Complaint, as well as the Corrected First Amended  
13 Complaint. The Corrected First Amended Complaint is now the  
14 operative complaint in this case. Accordingly, the Court DENIES AS  
15 MOOT Defendants' Motion to Dismiss the earlier, unamended  
16 Complaint. The Court grants Defendants fourteen (14) days from the  
17 date of this Order to file a motion responding to the Corrected  
18 First Amended Complaint.

19  
20 IT IS SO ORDERED.

21  
22 Dated: March 15, 2012

23  
24  
25  
26  
27  
28  
  
UNITED STATES DISTRICT JUDGE